

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

COLLEEN WAGNER)	
Claimant)	
VS.)	
)	Docket Nos. 222,155 & 222,156
INTERSTATE BRANDS CORPORATION)	
Respondent)	
Self-Insured)	

ORDER

Respondent appealed the preliminary hearing Order dated March 24, 1998, entered by Administrative Law Judge Floyd V. Palmer.

ISSUES

The Administrative Law Judge awarded claimant temporary total disability benefits. Respondent appealed and has raised the following issues:

- (1) Did claimant sustain personal injury by accident that arose out of and in the course of her employment between March 25, 1997, and her last day at work on June 16, 1997?
- (2) Did claimant provide respondent with timely notice of accident as required by K.S.A. 44-520?
- (3) Did the Administrative Law Judge err by holding a preliminary hearing when an amended hearing application was filed two days before changing the date of accident from March 25, 1997, to a period from March 25, 1997, until June 11, 1997 [sic]?
- (4) Is claimant temporarily and totally disabled?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For preliminary hearing purposes, the Appeals Board finds:

The preliminary hearing Order should be affirmed.

(1) The Administrative Law Judge found that claimant sustained personal injury by accident arising out of and in the course of her employment with respondent. The Appeals Board agrees.

The Judge had the opportunity to personally observe claimant testify and assess her demeanor and credibility. Claimant described her work with respondent, which required her to constantly and repetitively use her hands and arms to remove baking items from a conveyor belt. She also described how her complaints began in early 1997 and how the symptoms in her shoulder, hands, and hip ultimately progressed to the point she could no longer perform her work. That testimony is credible and persuasive.

In addition, both Drs. Murati and Ketchum related claimant's symptoms to her employment with respondent. In his February 13, 1998, report, Dr. Ketchum wrote:

Ms. Wagner is a 33-year-old employee of Dolly Madison. She has been to see four or five different physicians over the last five years. She does production-line work at Dolly Madison which requires her to be in the same position, which in some instances involves bending over for two hours at a time. In other positions, she is sort of in an awkward position, turned to her side and just does the same repetitive work over and over. She does some occasional lifting. She is still employed but hasn't worked since June 1997 because of restrictions put on her by another doctor because of her back problem. . . .

Part of her injury was certainly related to her work at Dolly Madison, that is, doing the repetitive work and being in poor postural positions repetitively over a prolonged period of time. Some of them, including her vascular problems, may not be related to her work, and we need to sort those out.

In his August 5, 1997, report, Dr. Murati states:

This 33-year-old female is being seen today following essentially accumulative injuries that took place over her seven-year employment at Dolly Madison on the production assembly line. The patient expresses that while doing her job standing all day, using repetitive motions of her arms and having to stoop and walk underneath conveyer belts all day, caused her pain to the upper extremities and to the right knee.

(2) The Administrative Law Judge found that claimant provided respondent with timely notice of accidental injury. The Appeals Board adopts that finding and conclusion.

Although the amended application for hearing indicates claimant last worked for the respondent on June 11, 1997, she testified her last day of work was June 16, 1997. She testified that she advised her lead person in early 1997 of her physical complaints from bending over and that her hands were bothering her. Claimant even completed a written claim form at work on March 25, 1997. That testimony is uncontroverted.

Although respondent raised the notice issue in its application for review, it did not brief that issue and, therefore, the Appeals Board is unable to address the specific objection, if any, the respondent had concerning the Judge's finding.

(3) The Administrative Law Judge did not err by holding the preliminary hearing two days after claimant filed an amended application for hearing changing the alleged date of accident from March 25, 1997, to the period between March 25, 1997, until June 11, 1997 [sic]. The Judge found respondent was not prejudiced because the claim for benefits was based on the same evidence and records. The Appeals Board agrees. Additionally, the Appeals Board finds that the amendment did not change the claimant's theory that she was injured as the result of repetitive mini-traumas. The claim for benefits was not significantly changed and the amendment merely corrected the application for hearing to conform with the evidence. Further, the respondent did not ask for leave to put on additional evidence or testimony.

The Legislature did not intend to bind the administrative law judges with technical rules of procedure. Instead, it intended expeditious and impartial hearings with the parties having reasonable opportunity to be heard and present evidence. K.S.A. 1997 Supp. 44-523.

(4) The issue whether claimant is temporarily and totally disabled is not one that the Appeals Board has the jurisdiction to address at this juncture of the proceeding.

The Act limits Appeals Board review of preliminary hearings to the jurisdictional issues set forth in K.S.A. 1997 Supp. 44-534a:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Was notice and claim timely?
- (4) Do certain defenses apply?

The issue whether claimant is temporarily and totally disabled is not a jurisdictional issue.

The Act also provides that the Appeals Board can review preliminary hearing orders when the administrative law judge has exceeded his or her jurisdiction. See K.S.A. 1997 Supp. 44-551(b)(2)(A). But under the preliminary hearing statute, the judge has the authority to decide whether a worker is temporarily and totally disabled. Therefore, the Judge did not exceed his jurisdiction.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated March 24, 1998, entered by Administrative Law Judge Floyd V. Palmer is affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

c: Michael G. Patton, Emporia, KS
James C. Wright, Topeka, KS
Administrative Law Judge, Topeka, KS
Philip S. Harness, Director